vicious experiment, we should certainly forfeit the respect of humanity if we should fail to act upon what is so clearly our duty and our responsibility, to see to it that the world is led further along that great experiment which was begun in the City of Philadelphia.

Limitations on the Functions of International Courts

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MUCH of the discussion on the desirability and feasibility of an international court has been based upon the premise that a court would furnish a substitute for war, that nations wanted a court for the settlement of their disputes, and that the actual establishment of a court would persuade nations to submit their differences for adjudication. The topic, of "Functions of International Courts and Means of Enforcing their Decesions," might indicate a belief that the debatable or open questions concern the functions of a court already created and the means necessary to carry its awards into execution. It will be my necessary, but ungrateful, duty to dispel the illusions and the misconceptions of fact involved in the assumptions of the major premise above mentioned.

No one would discourage the judicial settlement of disputes, and the desirability of such adjustment has been generally admitted by thinking men. The devoted efforts of certain societies and organizations for the establishment of an international court, the promise of certain statesmen to build a new world order upon the basis of such a court, and a widespread sentimental faith in the efficacy of the judicial process in settling the issues that arise among organized groups have served, I believe, to arouse expectations that can not be met and to confuse rather than enlighten the public mind. Inasmuch as progress can rarely begin from misunderstanding, it has seemed to me more useful to examine the manifest limitations upon the functions of an international court, than to extol the virtues of a court still to be created; my belief being that knowledge of the facts as they are, at least as my study discloses them, will prove of greater practical utility than an indulgence in the ideology of facts as they ought to be.

The belief that a judicial court would furnish a substitute for war has been one of the most common of the assumptions prevailing among important groups in many countries. The example is cited of the readiness and effectiveness with which our Supreme Court decides issues between states of the union, and the conclusion is drawn that obviously the same method could be adopted among the nations. Nothing could, in my opinion, be more erroneous. The existing order of international life, at least among the larger powers, is conditioned upon a continual struggle for economic advantage, in the preservation of home markets by tariffs and discriminations against more favored competitors; in the endeavor to capture foreign markets against the competition of commercial rivals; in the assurance of a steady and cheap supply of raw materials on the part of manufacturing nations, leading to competing efforts to control backward areas, colonies, protectorates, mandatories and other fields of investment, and to acquire the incidental machinery

and equipment necessary to make this enterprise successful,—merchant fleets, cables, trade routes, coaling and oil stations, and finally, armies, navies and alliances. With national security and economic prosperity the key-note and motive, raw materials and markets the major aims, and the instrumentalities just mentioned as the minor objectives, a picture is presented of the principal operative forces and factors which condition and shape international relations. Foreign policy is fashioned to the maintenance of supremacy in the continual struggle for national aggrandizement, of which these forces and factors, in varying degree, constitute the main and essential elements.

Bearing this in mind, it will be apparent that the issues created by this uninterrupted competition for advantage—supported by the people of each country on the very highest justification of self-preservation and prosperity—beget conflicts of interest which are not legal, but economic and political in character. Whether the Argentine or the Chinese market shall be captured by British, German, French or American commerce; whether the unsuccessful competitors will become reconciled to their loss of markets; whether the coaling and cable stations of the world are too largely controlled by certain nations for the safety of the foreign trade of other countries; in what degree the raw materials of the mandated territories and the colonies of the world are to be monopolized by the countries in immediate control—these questions, merely typical of the many that agitate the nations, present no issue of right or wrong which can be settled by an international court, any more than can the rivalry between two ardent youths for the affections of a fair damsel. Yet it is these very conflicts of interest that furnish the most effective causes of war.

Is it not apparent, therefore, that so long as international trade implies rivalry between national units organized politically and commercially with all the instruments of unfair competition, the hope of an international court as a substitute for war rests upon the weakest of justifications? No such economic issues are presented by the differences among our states with their free trade, so that the alleged analogy for an international court which is sought to be found in our Supreme Court deciding cases between the states—disputes of a rather limited class, pertaining usually to boundaries and minor matters—is quite misleading, and unwarranted. While international tribunals have settled many important issues,—notably the Alabama Claims, the North Atlantic Fisheries dispute, dozens of boundary and claims cases—which might have led to war, they have not settled and can not settle those larger economic and political issues which lie at the foundation of most modern wars.

Another common assumption is that the nations seriously desire an international court for the settlement of their disputes. This again I believe to be erroneous; at least experience would indicate that very often it has no basis in fact. Nations desire an international court, and have no difficulty in establishing one *ad hoc* when the occasion arises, when the dispute is unimportant or would not justify the expense of war; or when political considerations dictate submission to arbitration rather than recourse to war—in short, when they feel they have more to gain by arbitration or other form of peaceful settlement, such as mediation, than by war.

A few modern instances will suffice to give evidential support to this conclusion. In 1894 a plebiscite was to have been held in accordance with the Treaty of Ancon between Peru and

Chile to determine the sovereignty of the provinces of Tacna and Arica, now in the possession of Chile. The plebiscite has never been held. Continued efforts by Peru to submit this question to arbitration or to commit Chile to the principle of arbitrating international disputes have been unavailing. The reason is obvious. So long as Chile has the physical strength to hold what she has, she has little interest in inviting the uncertain, and what to her may seem the academic hazards of arbitration. This case, like many others, would indicate the need for compulsory arbitration, but as will presently appear, the larger powers are still averse to being compelled to adopt peaceful measures when other measures seem to them more expedient or profitable.

In 1914, two Mexican subordinate officers were alleged to have insulted the American flag at Tampico. The facts were in dispute, and are to this day, for the original telegram of the American admiral in command has not been published. At that time, we had already negotiated and were still engaged in negotiating treaties with various countries, the so-called Bryan treaties, by which incidents giving rise to differences between the contracting parties were to be submitted to a commission of inquiry, pending whose report hostilities were to be suspended for the period of a year. No better opportunity for the application of this principle could have been presented than the Tampico incident. Yet President Wilson, irritated at the obstinate refusal of President Huerta to abdicate his office, and oblivious to his own declared principle of a peaceful settlement of disputes, found in the incident that overt act which was deemed to justify the making of war on Mexico and the sacrifice of the lives of numerous Mexicans and Americans at Vera Cruz.

More recently, Austria, irritated at the continued efforts of Servia to create disaffection in and detach from the empire her southeastern Slav provinces, found in the assassination of Archduke Ferdinand so great a strain upon her patience that she refused to tolerate a judicial settlement of the differences with Servia, and launched upon an expedition of chastisement which ultimately engulfed the world and led to her own ruin and that of a large part of Europe.

And now France, gravely injured, disappointed and belligerent, finds almost irresistible the impulse to invade and crush Germany, and resents any effort to adjust the issues between the two countries by mediation or arbitration. The fact that the enterprise may again engulf Europe in war and ruin victor and vanquished alike beyond hope of recovery appears to be a secondary consideration only.

These illustrations are cited to dispel the illusion that nations in dispute desire judicial machinery for the settlement of their differences and that the great need of the world to bring about such settlement is an international court. On the contrary, nations that believe they have more to gain or are likely to be more successful in war than in arbitration or peaceful settlement, prefer the arbitrament of the sword and resent the efforts of mediators to frustrate the accomplishment of their objects. Indeed, it happens often that the greater the belief in the righteousness of the national cause, the less disposition there is to submit it to peaceful arbitrament; and it is not unknown that the strength of the conviction of righteousness is in direct ratio to the national military and economic resources. It is not a world court that is needed, but the intelligence to realize that war is in practically all cases the most wasteful and

ultimately the most senseless method of settling international conflicts of interest. So long as the causes of war remain unchecked and uncontrolled, there is little hope for a decrease of war; and if I judge correctly, the Treaty of Versailles, if permitted to remain the charter of the European settlement, condemns the coming generations to frequent and recurring wars.

Much propaganda has been spread to prove the necessity for an international court in continuous session, and much labor has been expended on actually bringing into being an international court of justice. The effort has been accompanied by an increasing number of treaties of arbitration among the nations. The greatest difficulty in carrying out the plan, however, is not how to execute the award of an international tribunal, to which subject much unnecessary zeal and earnestness have been devoted, but how to persuade and, if needed, compel, nations to submit their disputes to a court. My research fails to disclose more than half a dozen cases, among thousands, in which the award of an international tribunal has been refused execution by the losing nation. These have nearly always been small nations, the dispute a question of boundaries, and the ground of refusal an alleged error of jurisdiction. In view of the extremely unimportant nature of the question, therefore, it would seem unprofitable to spend much time in discussing it.

What is important, however, is the inability to compel unwilling nations to submit to a court. It has already been shown that the very nature of the serious conflicts of interest among nations makes a submission to judicial settlement hardly practicable, or at least exceedingly difficult. Yet this is not the only reason why nations, in concluding arbitration treaties, nearly always exclude from the obligation of arbitration questions of independence, national honor and vital interest—the only questions that are of any importance, and the only questions which could conceivably lead to war. Existing treaties of arbitration among the greater powers, therefore, constitute obligations to submit to arbitration anything they wish to submit and nothing more. The Covenant of the League of Nations, mistakenly hailed by many good people as a hopeful substitute for war, carefully avoided any change in this purely voluntary submission to arbitration. The Permanent Court of Arbitration at the Hague, created in 1899 and strengthened in 1907, and still the most practical achievement by way of an international court, leaves submission voluntary. More recently, under the auspices of the League of Nations, a body of distinguished jurists conceived and proposed a plan of a court of international justice, in permanent session, with obligatory jurisdiction. Hardly had the plan been presented to the Assembly of the League of Nations at Geneva, than the Council, consisting principally of the Great Powers, decided that the obligatory feature of the jurisdiction of the court was an undesirable innovation. Nations that have the political or economic stimulus to make and the physical ability to enforce their decisions prefer to be the judges of their own causes, and the sheriffs as well.

Nor can I see that a court of permanent judges is preferable, in the present organization of the nations, to a court of judges selected by the litigating nations from a panel. So long as jurisdiction is entirely voluntary, more actual arbitration will result from a court of judges selected by the parties *ad hoc* than from a court in whose composition the litigating nations had no

choice; for a nation that does not have to submit its dispute with another will surely not submit it to a court, to any of whose judges it takes exception. The international court of justice, therefore, seems to me much less practical then the existing Permanent Court of Arbitration at the Hague, which has already decided nearly twenty cases and to which the United States and Norway have recently submitted a dispute arising out of the requisitioning of Norwegian vessels by the United States.

Nor is a judicial decision of necessity a guaranty of peace. One need but refer the student of American history to the Dred Scott decision of the United States Supreme Court to be convinced of this. That decision made the Civil War inevitable. Other cases might be mentioned. Some years ago Ecuador and Peru submitted their boundary dispute to the arbitration of the Council of State of Spain. After deliberating on the matter, the Council of State let it become known that their award, still unannounced, placed the line at a point which would give much territory to Peru and leave Ecuador with a very small area. Both countries realized that the award, if handed down, would precipitate war between the two nations, so, at the suggestion of the litigating countries, the award has been withheld by the Spanish Council of State.

Just what was meant, therefore, by the campaign announcement last fall that a scheme for a world association would be constructed around an international court for the settlement of disputes between nations has been something of a mystery. One is led to suspect that its advocates had not thought deeply on the subject. As a plan for an ordered community life among the nations, it holds out even ess hope than the League of Nations; and the belief that the latter holds out little beyond a prospect of entanglement of the United States in the intrigues of Europe is, I think, entirely justified.

From what has been said, it may have become apparent that the value and utility of an international court are limited by the prevailing conditions of international relations and the factors and forces which dictate and fashion those relations. They make it evident that an international court can not settle those larger issues which lie at the foundation of most international conflicts, and that nations that have the physical power still prefer to be the judges of their own causes and resist any plan to bring about a compulsory submission of disputes. If compulsion could be brought about to submit even the narrow range of questions that are susceptible of judicial settlement, such as pecuniary claims for injuries to individuals, questions of interpretation of treaties and other questions of law, with a stipulation that these can not be considered questions of national honor or vital interest, some progress will have been made, but the difficulty of obtaining official acquiescence even in this mild proposal will indicate the enormity of the greater task of promoting a more general resort to judicial methods of settling international disputes.

If I judge correctly the temper of the world, there is less disposition now to adopt the civilized methods of adjusting conflicting interests than there has been for generations. Few people realize or are willing to contemplate the facts that six years of devastating war and devastating peace have undermined the moral foundations of many densely populated areas of the world; and that there is now more faith in the efficacy of force—and less faith in law—as a solution for international differences, than there has been since

the days of Napoleon. The forces of disintegration are apparently overpowering the forces of reconstruction, due primarily, I believe, to the short-sighted policy of the present managers of European political affairs.

So long as that condition prevails, discussion of the enlarged functions of an international court will be to a great extent academic and theoretical. Yet, however limited the functions of such an international court may be, I am inclined to believe that in the absence of obligatory jurisdiction, more practical results can be achieved from the existing so-called Permanent Court at the Hague, selected by the litigating nations from a panel of judges, than from a court of fixed judges in constant session—however strong in theory may be the conceptual appeal of a supreme court of the world.